



DATE: APR 5 1989
CASE NO. 88-INA-296

IN THE MATTER OF

BELL NORTHERN RESEARCH,
Employer

on behalf of

JACQUES H. GAUTHIER,
Alien

David Swaim, Esq.
Dallas, TX

For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge;
and Brenner, Tureck, Guill, Schoenfeld and Williams
Administrative Law Judges

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (hereinafter "the Act"). The Employer requested review from U.S. Department of Labor Certifying Officer Benjamin Bustos' denial of a labor certification application pursuant to 20 C.F.R. §656.26.¹

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission into the United States

¹ All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

and at the place where the alien is to perform the work; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of Part 656 of the regulations have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means, in order to make a good faith test of U.S. worker availability.

This review of the denial of a labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties [see §656.27(c)].

Statement of the Case and Discussion

On December 19, 1986, Employer, Bell Northern Research, filed an application for alien employment certification on behalf of the alien, Jacques Henri Gauthier, for the position of Manager Regression Test.² (AF 116-118). The qualifications for the position, as set forth in Form ETA 750-A, included two years of college education in electronics/telecommunications and/or computer programming and five years of directly related telecommunications experience, or in the alternative, eight years of directly related telecommunications experience in lieu of education and experience (AF 116). "Other Special Requirements" were listed as:

Thorough knowledge of existing switching systems, computer programming, comprehensive knowledge of digital switching design or testing knowledge of system architecture. Requires knowledge of testing simulation, knowledge of software/hardware interface and voice switching test methodology. (*Id.*)

Nine applicants were referred in response to Employer's recruitment efforts. In an affidavit dated March 26, 1987, Employer reported that of the nine applicants, only five actually contacted Employer and requested interviews. Employer stated that the remaining four applicants

² Employer initially submitted an application for alien labor certification on December 4, 1985 which was withdrawn from consideration by Employer by letter dated June 24, 1986. By notice dated July 21, 1987, Employer was advised that the instant application was being remanded to Employer for resubmission "because it has been resubmitted for processing prior to the established admissible date of January 11, 1987." Section 656.29(a) of Title 20 Code of Federal Regulations provides for a six-month waiting period in the filing of a new application by an Employer for the same occupation. Citing §656.29 (a), Employer noted that the six-month waiting period provision for refiling of an application was inapplicable in the present case because the Employer's second application was based upon an entirely different position than was the first. Following Employer's response and upon further review, the Certifying Officer acknowledged that he erred in remanding the new application and accordingly it would be processed "as soon as possible." (AF 69-73)

had not contacted Employer regarding the position, despite Employer's invitation for a personal interview, sent certified mail. In its affidavit, Employer detailed its reasons for rejecting each of the five applicants interviewed (AF 82-84).

In a Notice of Findings ("NOF") dated September 18, 1987, the Certifying Officer ("CO"), citing §656.21(b)(7), determined that three of the applicants rejected by Employer were rejected for non-job related reasons and thus there are U.S. workers who are available and are able, willing and qualified for the job (AF 66-67).

In its rebuttal dated October 23, 1987, Employer further reviewed and discussed in greater detail the reasons for rejecting the three applicants identified as "qualified" by the C.O. Employer stated that it is involved exclusively in the development of digital telephony and indicated its fundamental reason for rejecting the applicants was their lack of experience with digital telecommunications, a minimum qualification required to properly perform the job (AF 59-64).

The CO issued his Final Determination on February 2, 1988, denying certification. The denial was based upon a finding that Employer had expanded the minimum requirements from those stated as the minimum requirements in the initial job listing "by applying more stringent requirements for experience with specific types of switches, hardware, and software." He concluded "[t]he employer has not adequately documented that the U.S. workers did not meet the employer's actual minimum requirements as described by the job opportunity" (AF 57).

The CO's conclusion that Employer has added new requirements in its rebuttal is erroneous. Bell Northern Research is a research and development organization for digital telecommunications. Employer states that it works exclusively in digital telephony (see AF 62), and contends that, based on current technology, specifying "digital" telecommunications would be redundant (see AF 5). Moreover, Employer clearly stated the requirement of comprehensive knowledge of digital telecommunication switching design, in line 15 of Form ETA 750, Part A. Although it can be argued that Employer could have placed more emphasis in its Form 750-A and advertisements on the "digital" telecommunications aspect of the job, the record indicates that knowledge and experience in "digital" telecommunications has always been a requirement for the job. Further, since the advertisements explicitly mentioned "digital telephony," qualified U.S. workers should not have been dissuaded from applying for the job.

Employer explained that, although Mr. Cochran and Mr. Gillum, two of the applicants identified as "qualified" by the C.O., have extensive knowledge of analog systems, neither Mr. Cochran nor Mr. Gillum have any experience in the digital telecommunications field. The third applicant, Mr. Nurmet, previously was employed by Employer's parent company as a "trainer." Employer found that Mr. Nurmet lacked the prerequisite education requirements as well as any experience in the technical functions and software systems associated with digital technology. Moreover, Mr. Nurmet had been fired by Employer's parent company "due to deficiencies in his performance as a manager." (AF 63).

In his Final Determination, the C.O. first stated that the job opportunity "has been described with the Employer's actual minimum requirements." He then went on to find that on rebuttal Employer expanded the minimum requirements. The CO did not allege that the requirements listed are unduly restrictive, only that they have been "expanded" in rebuttal. In finding that Employer has "expanded" the minimum requirements for the job opportunity, the CO evidently ignored the Employer's listing of "Other Special Requirements" as detailed under line 15 of Form ETA 750-A. His determination that the three applicants identified are qualified for the position likewise ignores the listing of these special requirements. It is significant that the CO did not contend that any of the U.S. workers met the "digital telecommunications" requirement.³

The rejection of each of the applicants was based upon their failure to meet Employers' minimum requirements, requirements described in Form ETA 750-A from the outset.

As each of the applicants clearly fails to meet all of the job requirements, including those set forth under "other special requirements", none of the applicants is qualified for the job. See, e.g., Concurrent Computer Corp., 88-INA-76 (Aug. 19, 1988) (en banc). Accordingly, the basis for denial being without merit, the denial of certification is reversed.

ORDER

The Certifying Officer's determination denying alien employment certification is reversed, and certification is granted.

JEFFREY TURECK
Administrative Law Judge

JT:jb

³ Because this case arises in the Fifth Circuit, we note that the CO did not contend that the job could nonetheless be performed without knowledge of digital telecommunications. Cf. Ashbrook-Simon-Hartley v. McLaughlin, 863 F.2d 410 (5th Cir. 1989).